Concrete Pipe Corporation *and* General Drivers and Dairy Employees Union Local No. 563, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 30-CA-4133

September 27, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

On May 25, 1978, Administrative Law Judge Irwin H. Socoloff issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a brief in answer to General Counsel's exceptions and in support of the cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon a charge filed April 26, 1977, by General Drivers and Dairy Employees Union Local No. 563, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, against Concrete Pipe Corporation, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 30, issued a complaint dated June 30, 1977, alleging violations by the Respondent of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amemded, herein called the Act. Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, hearing was held before me in Neenah, Wisconsin, on September 15, 1977, at which the General Counsel and the Respondent were represented by counsel and all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs, which have been duly considered.

Upon the entire record in this case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Wisconsin corporation engaged in the manufacture of concrete pipe at its Menasha, Wisconsin, plant. During the year ending December 31, 1976, a representative period, Respondent purchased and received goods and materials valued in excess of $50,000 from suppliers located within the State of Wisconsin who had purchased and received said goods and materials directly from suppliers located outside the State of Wisconsin. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

General Drivers and Dairy Employees Union Local No. 563, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

The Union is the certified representative of Respondent's employees in a plantwide unit which includes production workers, truck drivers, maintenance workers, and machine operators. Since 1962, Respondent and the Union have concluded some six or seven collective-bargaining contracts, the most recent of which expired on April 1, 1977.

In early March 1977, the parties exchanged proposals, by mail, for a new contract, and, thereafter, bargaining meetings occurred, beginning on March 16. Among the topics of negotiation was Respondent's proposal, first stated in its March 3, 1977, letter to the Union, ". . . to hire a mechanic as soon as possible . . . whether or not the former maintenance man has been recalled. When the former maintenance man is recalled, we propose to recall him as a production worker."[1]

On April 20, 1977, Respondent implemented the above-stated proposal, after three meetings with the Union has failed to produce an agreement pertaining to that matter. In this proceeding, the General Counsel contends that Respondent thus unilaterally altered the existing seniority system, in violation of Section 8(a)(5) of the Act. Respondent

[1] Concrete Pipe Corporation's business is seasonal in nature, and as a result some 6 to 10 of the 16 bargaining-unit employees are generally laid off during the winter months. Such a layoff was in effect at the time of the March 3 letter, and among the laid-off employees was "the former maintenance man" referred to therein.

asserts that the parties had bargained to impasse on the matter before it took action and that, in any event, Respondent acted in harmony with existing practices. The parties agree, as stated by Counsel for the General Counsel at the hearing, that "overall bad-faith bargaining" is not at issue.

B. *Facts*[2]

The parties have, historically, maintained a plantwide seniority system for layoff and recall purposes. Their most recent contract provided, at article 8, section 3, that:

> In laying off employees because of reduction in forces, the employees shortest in length of service shall be laid off first, *provided, those retained are capable of carrying on the Employer's usual operations, and ability to perform work is normal.* In re-employing, employees on the seniority list having the greatest length of service shall be called back first, *provided they are qualified to perform the available work.* In filling vacancies or making promotions, the employee with the longest service record, *if qualified,* to learn, shall be given preference. [Emphasis supplied.]

The 1977 contract negotiation meetings occurred on March 16, April 7 and April 19, at which time Respondent announced the implementation of its proposal to hire a mechanic. Thereafter, the parties met again on May 4, May 24, August 8, and September 8.[3] Throughout negotiations, the Union was represented by Business Agent Vandenbergen and employees Adamovich and Hanson, while, for Respondent, Operations Manager Van Schyndel and Attorney Walker were present.

At the initial March 16 meeting, the parties discussed the previously exchanged proposals. With respect to Article 8, the Union proposed a "one week notice for layoff" provision, as well as certain job-posting language. Respondent advanced its desire to change from a plantwide seniority system to a system based upon seniority within each employee classification. In addition, Respondent announced its desire to hire one Dale Jost, a former employee, as a year-round mechanic and to recall maintenance man Jerry Schneider as a production worker, a lower paying job, since, in Respondent's view, Schneider was not a qualified mechanic. The Union opposed hiring a new employee while existing employees were on layoff status. It agreed, however, to seek the opinions of other employees with respect to Schneider's qualifications. Respondent stressed its need to resolve the matter as quickly as possible.

At the April 7 meeting, the mechanic issue was the initial topic of conversation. Walker asked the Union what it had learned after meeting with the employees. Vandenbergen responded that "none of them had anything bad to say about Mr. Schneider's work as they saw it." Vandenbergen also stated that there were three other employees with more seniority than Schneider, all of whom felt qualified to handle the job; namely, Adamovich, Keeney, and Romportl. Van Schyndel responded, stating that none of them were qualified. He asked Adamovich if either he or Keeney were interested in a year-round mechanic position. Adamovich conceded that they desired to work as mechanics in the winter only, and to work as drivers in the summer. He further stated that he, Adamovich, was not really a diesel mechanic. However, Adamovich claimed that Jost was "too good" for the job and asked that Romportl be given a 30-day trial period as a year-round mechanic. Walker responded, stating that Respondent wanted no trials; it wanted a mechanic by trade. Van Schyndel stated that, in any event, Romportl was not qualified and that he, Van Schyndel, was tired of contracting out mechanical work at $15 per hour for jobs Schneider could not handle. Walker added that Respondent had little or no flexibility on the mechanic issue, and that it was a matter of urgency. However, Walker stated, if the Union agreed to Respondent's mechanic proposal, Respondent would consider some of the Union's seniority proposals, particularly, job posting. As the meeting adjourned, Walker asked Vandenbergen to consider the Employer's overall mechanic-seniority position and to call Walker before the next negotiating meeting. Walker again stressed Respondent's need to resolve the matter quickly.

Some 2 or 3 days later, Van Schyndel informed Adamovich that "We no longer have to worry about Jost. He went back to work for Streu." Adamovich conveyed that information to Vandenbergen, who then concluded that the mechanic issue had been laid to rest. Thus, Vandenbergen did not call Walker before the third negotiating meeting held on April 19.

During the April 19 meeting, Walker asked Vandenbergen what the Union had decided about the mechanic matter. Vandenbergen stated he had been informed that Jost had taken another job and was not interested in working for Respondent. Walker said that that was not so and that Respondent still wanted to hire him. Walker then advanced a compromise proposal which included hiring Jost, "carving out" the mechanic classification from the plantwide seniority system, and creation of a job-posting procedure, with the right of final selection left to Respondent. The Union rejected that proposal and also stated that Romportl was qualified to work as a year-round mechanic. Walker stated that Respondent would be able to go along with the Union's desire to retain plantwide seniority except for the mechanic, who was needed year-round. He also assured the Union that the mechanic would not perform production work. The Union stated that it was willing to

[2] The factfindings contained herein are based upon a composite of the testimony of Union Business Representative Dennis Vandenbergen, employee James Adamovich, Jr., and Respondent's operations manager, Henry Van Schyndel, all of whom impressed me as truthful witnesses. To the extent that the testimony of Vandenbergen and Adamovich differs from that of Van Schyndel with respect to occurences at negotiating meetings, I have accepted the testimony of Vandenbergen and Adamovich, both of whom exhibited a much surer recollection of events than did Van Schyndel.

[3] At the hearing, I refused to allow the General Counsel to inquire into the substance of negotiation meetings held on August 8 and September 8, which was offered for the purpose of showing that there was not an impasse on the mechanic issue on April 19. In my judgment, the later meetings occurred at a point too remote in time to affect the impasse issue. Upon interim appeal, that ruling was upheld, Member Murphy dissenting. In her brief to me, Counsel for the General Counsel has requested reconsideration of the ruling, which she continues to categorize as a refusal to hear evidence beyond the May 4 meeting. Indeed, in the interim appeal document previously filed with the Board, she claimed that I refused to hear evidence concerning the May 24 meeting. In fact, Counsel for the General Counsel offered no evidence of events at the May 24 meeting because, as she stated at the hearing, the mechanic issue was not discussed. Upon reconsideration, I have again concluded that I should not receive evidence concerning the August 8 and September 8 meetings.

"carve" a mechanic classification out of the plantwide seniority system in exchange for its own job-posting language. The Union also proposed that Romportl be given the mechanic position on a 30-day trial basis and at his then current rate of pay for the trial period (rather than the higher mechanic rate). Walker rejected that offer. Before the lunchbreak, Respondent asked the Union to further consider its proposals and to give Respondent an answer. Walker stated that Respondent could not wait all summer, and that it had already waited 2 months.

Following the lunchbreak, Walker asked Vandenbergen what the Union had decided. Vandenbergen replied that the Union wanted to set up a meeting of the bargaining committee, Schneider, Romportl, and Union Secretary-Treasurer Schlieve. Vandenbergen further stated that Schlieve was then out of town and unavailable for consultation. Following a caucus, Walker stated that Respondent could not wait while the Union stalled. Respondent then announced its intention to hire Jost in accordance with its original proposal. Vandenbergen objected strenuously to such an action by Respondent while the parties were still discussing alternatives.

After discussion of other issues, the Union gave Respondent an overall counterproposal dealing with open issues. With respect to seniority, the Union proposed a requirement of 1-week notification before a layoff; retention of existing contract seniority language (rather than its previous job-posting proposal); and a separate mechanic classification that included both Schneider and Jost, with Schneider senior to Jost.

Jost was hired as a mechanic on April 20, 1977, and began work on April 21. Thereafter, the Union filed the instant unfair labor practice charge, and Schneider filed a grievance. The parties met again on May 4 to discuss the Schneider grievance and to continue negotiations. Respondent, maintaining, *inter alia*, that Schneider was not qualified to perform the mechanic job, denied the grievance. Vandenbergen threatened to take the matter to arbitration. The parties then discussed various contract proposals. Respondent offered a wage concession if the Union would agree to seniority by classification. The Union offered to retain the existing contract seniority language (with the addition of the 1-week notification language) and to permit Respondent to retain Jost as a mechanic, junior to Schneider, in a separate mechanic classification. The Union also offered to waive lost wages and benefits for Schneider since the April 21 hiring of Jost. Respondent accepted the Union's layoff-notification proposal. The mechanic-seniority issue remained unresolved.

Van Schyndel testified that in the spring of 1977, prior to hiring Jost, Company equipment was being serviced by outside contractors. Van Schyndel had concluded, after observing Schneider's performance as a maintenance man for more than a year, that the latter's work was not satisfactory because of a lack of ability. Written warnings had not been issued, since Van Schyndel believed that that would not have improved the situation. Respondent was familiar with Jost's abilities from his previous work with it, and when Van Schyndel learned that Jost was available, he wanted to hire him. Van Schyndel further testified that by spring 1977 the hiring of Jost had become a matter of urgency because Respondent's equipment was in need of additional servicing prior to the start of its busy season and because Respondent feared that Jost would take another job if he was not offered employment by Respondent. Van Schyndel also felt that Jost had overcome the earlier problems (tardiness and failure to report to work) which had led to his discharge in February 1974. Adamovich, in his testimony, conceded that Jost was a better qualified and more experienced mechanic than Schneider.

In recent years, layoffs and recalls at Respondent's plant have generally been effectuated in accordance with the plantwide seniority system, provided that the retained or recalled employees are capable of performing all necessary job functions. When maintenance man Schneider is on layoff status, mechanical work is often performed by drivers Adamovich and Keeney or contracted out. However, several years ago, during Jost's first tenure as Respondent's mechanic, Jost was retained, out of seniority, while more senior employees were laid off.[4] More recently, Respondent attempted to retain Schneider during a layoff period.[5] However, the Union objected, claiming that the more senior Adamovich and Keeney were just as qualified to do mechanical work as Schneider.

C. *Conclusions*

Viewed as a matter of negotiation between the parties, this dispute touches one of the fundamental issues of labor-management relations. Respondent believed itself in need of a skilled mechanic, and further believed that it was necessary to hire a new employee to fill the position. The Union sought to preserve the work for existing members of the bargaining unit. Three negotiating sessions failed to bridge the differences. In Respondent's view, as set forth in its brief, the matter had been fully discussed by April 19 and no hope for agreement remained. Respondent further points out that the dispute must be seen in its context. The matter arose between parties who have enjoyed a long and harmonious bargaining relationship. Respondent's need was legitimate, and advanced in good faith. The record contains no suggestion of bad-faith bargaining or unlawful antiunion motivation. Only in the most technical sense can this dispute be seen as an issue for the Board, rather than as a matter of difficult negotiation between the parties.

Nonetheless, I cannot conclude that the parties were at an impasse on April 19, 1977, when Respondent implemented its proposal. The Union and Respondent had met but three times. At those sessions, negotiations had yielded considerable revision of bargaining position by both sides. Respondent had retreated from its demand for seniority by classification; it would settle for continuation of plantwide seniority, provided the mechanic was "carved out" of the system. Respondent also agreed to the Union's demand that the mechanic perform mechanic work only. The Union, for its part, agreed to a separate mechanic classification. Ultimately, it agreed to the hiring of Jost as mechanic, albeit as

[4] At that time, Adamovich filed a grievance claiming that while he, a more senior employee, was on layoff status, Jost engaged in truckdriving work as well as the performance of mechanical duties. The grievance did not complain about Jost's retention as a mechanic. In settlement, Adamovich received backpay for time spent by Jost in driving a truck.

[5] Adamovich, Keeney, and Romportl all enjoy higher seniority standing than Schneider, who at the time of the instant dispute stood 14th on a 16-person seniority list.

junior to an existing bargaining unit employee. The Union also offered alternatives to the retention of Schneider as a mechanic. It offered Romportl on a trial basis, and at a lower rate of pay during the trial period. In sum, there was movement on both sides. It is true, as urged by Respondent, that on the afternoon of April 19, the Union was not prepared for further movement but rather desired time for future internal consultations. However, the Union's difficulties in that regard were created by Respondent, since prior to the April 19 meeting Van Schyndel had errantly informed a member of the Union bargaining committee that the Jost matter was no longer an issue. Thus, in my view, under the *Taft Broadcasting Co.*[6] standards, the parties were not at an impasse on April 19. The prospects of concluding an agreement had not been exhausted. If the issue of impasse were determinative, I would find a violation of Section 8(a)(5) of the Act.

However, I have further concluded that Respondent's actions herein did not effect a change in established terms and conditions of employment. Under the expired agreement, layoffs were to be accomplished in accordance with the plantwide seniority system "provided, those retained are capable of carrying on the Employer's usual operations and ability to perform work is normal." Recall of employees by plantwide seniority was mandated "provided they are qualified to perform the available work." In filling vacancies, or making promotions, the contract required that Respondent give preference to the most senior employee, "if qualified." Thus, under the plain terms of the expired contract, Respondent was privileged to hire Jost as its mechanic if existing employees were not qualified to perform that work.

Respondent approached the instant dispute after having made the good-faith determination that it needed a mechanic possessing Jost's skills and that Schneider and other members of the bargaining unit lacked the requisite ability. The Union's objection to Jost, as stated by Adamovich, was that he was more skilled than necessary, and that the less qualified and less experienced Schneider was sufficiently able to handle the work. Having observed the work of both Jost and Schneider during past periods, Respondent maintained a different view.

In processing the Schneider grievance, the Union gave tacit recognition to Respondent's right, under the terms and conditions established by the expired contract, to employ a mechanic out of seniority. Thus, the Union did not maintain that plantwide seniority should be followed. It maintained that Schneider should be recalled as a mechanic while more senior employees were still on layoff status. Moreover, during Jost's previous tenure as mechanic, the Union had agreed to his retention during layoff periods, without regard to his seniority standing, because of Respondent's need for a skilled mechanic. By contrast, during Schneider's tenure, the Union had insisted, prior to the instant dispute, on adherence to plantwide seniority because, it had successfully argued, Schneider was no more skilled as a mechanic than the truck drivers and other employees.

In light of the plain meaning of the seniority language contained in the expired contract; the past practice and contemporaneous actions of the parties, which, to say the least, did not detract from the literal terms of that agreement; and Respondent's need, asserted in good faith, to hire a mechanic more skilled than any of the existing members of the bargaining unit, I conclude that Respondent, in hiring Jost, did not unilaterally effect a change in established terms and conditions of employment. Accordingly, the complaint, alleging a violation of Section 8(a)(5) of the Act in that regard, should be dismissed.

Conclusions of Law

1. Respondent, Concrete Pipe Corporation, is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Drivers and Dairy Employees Union Local No. 563, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The complaint is dismissed in its entirety.

[6] *Taft Broadcasting Co., WDAF AM-FM TV*, 163 NLRB 475 (1967), enfd. 395 F.2d 622 (C.A.D.C., 1968).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.